

APPENDIX I

Public Comments on Financial Privacy and Bankruptcy

In the July 31, 2000, publication of the Federal Register, the Department of Justice, Department of Treasury and Office of Management and Budget (the Study Agencies) announced their intent to conduct a study on how the filing of a bankruptcy affects the privacy of individual consumer information that becomes part of a bankruptcy case. The Study Agencies also requested public comments and supporting documentation from all sources on any aspect of the subject, and provided a series of questions grouped according to the 7 basic elements of the study. Due to requests for additional time for submission of public views, the comment deadline was extended by two weeks in the August 31, 2000, publication of the Federal Register.

In response to the publication of the study, the Study Agencies received 41 public comments. The comments came from a wide variety of correspondents, including financial institutions and associations, credit card companies, bankruptcy attorney associations, courts, state and federal government agencies, privacy rights groups, a bankruptcy trustee organization, information service providers, investigative and private enforcement organizations, academia, and private individuals. The Study Agencies reviewed each letter submitted and grouped the public comments according to the specified elements of the study. The comments are also grouped as to whether they addressed the advantages and disadvantages of the flows of personal information.

Following are summaries of the comments in the order in which the elements of the study appeared in the July 2000 Federal Register.

Element 1 - Collection, Analysis, and Dissemination of Debtor Information in Bankruptcy

Questions:

- (1.0) What types of information are collected from and about individual debtors, analyzed and disseminated in personal bankruptcy cases?
- (1.1) What types of information are collected, maintained and disseminated in bankruptcy?
- (1.2) Which of these data elements are public record data?
- (1.3) Which are non-public record data held by bankruptcy trustees?
- (1.4) How much data is at issue?
- (1.5) Are certain types of data more sensitive than others; that is, are there types of data in which debtors would have a stronger privacy interest? If so, which ones?
- (1.6) How valuable is the information in the marketplace?

Comments - General:

Overall, the commenters were aware of the specific types of information collected from and about individual debtors in bankruptcy. Most commenters noted that the public record contains

financial information as part of schedules attached to bankruptcy petitions and related motions, including items such as debtor name and address; bank accounts, balances, and identifying numbers; credit card accounts and account numbers; social security numbers; income; detailed listings of assets and liabilities; and budgets showing the individual's regular expenses.

Several commenters also noted that non-public information which is held by the trustee in administering the case is included in additional schedules, tax returns, supporting information concerning the value of property, depositions taken to ascertain the propriety of certain filings, and information relative to investigative reports. Overall, the commenters found it difficult to quantify the value of the information collected in bankruptcy.

Comments - Advantages of Flows of Personal Information:

Credit card companies commented that the disclosure of personal identifiers, such as Social Security numbers and financial account numbers, must continue to be available so that all entities can determine whether a particular bankruptcy case relates to a specific individual. They also commented that these disclosures are necessary as other more basic identifiers, such as name and address, are not reliable enough by themselves.

Some of the credit union associations commented that the types and amounts of information they collect from individual debtors are minimal, and that they rely on credit reports to a great extent for their bankruptcy information.

A financial association commented that it does not perceive any greater sensitivity of any particular class of data that would justify excluding it from the public record or limit its availability.

Comments - Disadvantage of Flows of Personal Information:

A majority of the commenter's agreed on several data elements that they considered to be sensitive data, including debtor's name and address, Social Security number, bank and credit card accounts, financial account numbers, and other identifying numbers.

Several commenters also believed that additional types of information should be considered as sensitive data, including employer's name and address; descriptions of security with regard to debts which will survive bankruptcy, names and addresses of non-filing co-debtors; names and ages of non-filing support payees; job title, employer and income of non-filing spouse; names and ages of dependents; and sensitive budget items such as religious donations, fines, and specialized school expenses. One commenter suggested that an individual's medical services, financial condition, religious or other affiliations, and any information concerning children should be considered sensitive.

A clerk of the U.S. Courts commented that personal identifiers such as name, physical and e-mail addresses, telephone numbers, Social Security and tax identification numbers, photographs, and any account numbers, have been found to have the strongest sensitivity and are protected by the

strongest privacy interest. The commenter also believes that public money should not be spent for private purposes, and that questions regarding the collection and uses of data should not be influenced by how valuable access to the information may be for other uses, commercial or academic.

A consumer privacy organization commented that due to the fact that certain types of debtor information, such as Social Security numbers and financial account numbers, can place individuals at risk for harm, they should receive special consideration from disclosure.

A privacy rights group commented that Social Security numbers, credit card numbers, loan accounts, dates of birth, and bank account numbers represent a gold mine to dishonest individuals as well as the rising number of organized criminal enterprises that specialize in systematic identity theft.

One commenter stated that the principles found in the Code of Fair Information Practices, not the sensitivity of the data, should be the basis for determining whether information provided during a bankruptcy process is available for other purposes.

An attorney association commented that Social Security numbers are the most common form of personal information associated with identity theft, and can be used to obtain a driver's license, open a new credit account, apply for a loan, and obtain a copy of the victim's credit report. This sensitive information should be redacted, as such scams not only victimize the debtor, but the bankruptcy courts as well by clogging the system with fraudulent filings.

An academia commenter suggested that 11 U.S.C. § 107 needs to be revisited and consideration should be given to: (a) what is and should be meant by "public" data; (b) whether the exceptions to publicness are sufficient; and (c) whether the burden of proof needs to be shifted. The commenter believed that the exceptions to "publicness" need to be broadened and the burden of proof should not be on the individual seeking to invoke privacy. The commenter believed that there should be a reassessment regarding what data is collected, and the format in which that data can and will be made available to the different audiences.

Element 2 - Current and Envisioned Practices for the Collection, Analysis, and Dissemination of Debtor Information in Bankruptcy

Questions:

- (2.0) What are the current practices, and practices envisioned for the future, for the collection, analysis, and dissemination of information in personal bankruptcy proceedings?
- (2.1) What methods of data collection and aggregation are now used by the courts, creditors, trustees, and other private actors to collect analyze, and disseminate public record data and non-public record data?
- (2.2) What methods are being contemplated for the future?

Comments - Current Practices:

A clerk of the United States Courts commented that there are currently two methods used to collect data, in paper documents or in electronically filed documents. Of the information collected from the petition, adversary cover sheets, proofs of claim, and titles of pleadings, some is aggregated in a database and are available for viewing. It is possible to search the database for specific names, debtor, judge, trustee, and attorney as well as for Social Security and tax identification numbers.

A financial association commented that various commercial companies regularly collect basic public data regarding new bankruptcy filings, check it against the debtor's credit histories, and provide notices to listed creditors subscribing to such a service that a borrower has filed for bankruptcy.

Several information services providers commented on the different approaches they use to access debtor information. One provider stated that their primary source for debtor information is the U.S. Court's computer system. The information gathered from the court's computer system is then used by the providers to alert creditors of a consumer's bankruptcy. Another information provider commented that it is typical to obtain public record information from a private supplier who has collected and compiled it, and the information is in turn used to create individual reference service products for distribution.

A credit union association commented that it obtains access to financial information from the court by either requesting a copy of the debtor's schedules, reviewing the bankruptcy file at the court, using direct, free Internet access via passwords administered by trustees, or accessing commercial databases on a fee-per-use basis.

Comments - Envisioned Future Practices:

A clerk of the U.S. Courts commented that the courts are considering several changes regarding the collection and dissemination of debt or information. First, all filings will slowly become electronic and paper will become a smaller portion of the source of information collection. The second change contemplated involves charging fees to file electronically and for access to all electronic court records.

A bankruptcy trustee organization commented that, in the near future, the National Data Center (NDC) will make status information, entered directly by trustees, available over the Internet to parties in interest. In doing so, the NDC will contract with trustees regarding the following: (a) the trustee will agree to transmit selected status information to the NDC on a regular basis; (b) the trustee will provide debtors notice of the fact that their status information will be available on the Internet by parties in interest; (c) the trustee will agree to investigate immediately and, if necessary, rectify alleged errors in the data reported by the debtor; and 4) the trustee will work towards a unified method of identifying national creditors among all trustees. The NDC, in turn, will contract with creditors who subscribe to its Internet site to ensure that creditors agree to: (a) only use this information for their collection of a claim against the bankruptcy estate; (b) not sell

this information to third parties or to use such information for the purpose of marketing, advertising, extending credit, etc.; (c) move towards using a single identifying number and/or address when participating in bankruptcy cases; and (d) submit to an internal or external audit. Finally, the NDC will establish and maintain a secure electronic database to prevent unauthorized access and will limit displayed information, and particularly personal identifiers (e.g., Social Security number) to the minimum amount to allow creditors to monitor and assert their claims.

A financial association commented that some jurisdictions are experimenting with electronic filing of all aspects of the court system, including bankruptcy. They also noted that although the principal opposition to electronic filing has been the cost to convert from a paper system, the privacy issue may become a prominent issue.

Comments - Advantage of Flows of Personal Information:

Most of the financial associations commented that the collection and dissemination of data benefits all in the process, and the use of available and future information technology should be utilized to improve data flows. One association commented that the rapid availability of information assists creditors in their timely assertion of their rights.

Information services providers commented that bankruptcy records are used by individuals and businesses to protect their financial interests by monitoring dockets, access filings, and preparing for cases. The information is used to alert creditors to a consumer's bankruptcy and thereby, allow creditors to quickly remove bankrupt consumers from their call queues and collection letter mailings. They also believe that unrestricted access to this information will allow for continued efficient and cost-effective service to creditors and debtors.

A consumer privacy organization commented that the government and private sector are undergoing major changes in how they collect, analyze and distribute information. It noted that not only all facets of information collection and processing are becoming more automated, but also that government entities are integrating or linking their information systems to enhance efficiency and reduce fraud.

Comments - Disadvantage of Flows of Personal Information:

The FTC commented that the commercial use of highly personal and sensitive non-public information may implicate concerns under the Fair Credit Reporting Act, and should be prohibited. Disclosure of non-public data, as with public data, may facilitate identity theft and other illegal conduct.

A clerk of the U.S. Courts commented that although the envisioned practice of charging for data will diminish the accessing of bankruptcy records by the general public, the transformation from paper to electronic records will make hiding the personal identity of a debtor or creditor more difficult. The commenter also noted that the transformation from paper to electronic records will provide the ability to conduct full text searches of every document in the database and, therefore, make hiding the personal identity of a debtor or creditor more difficult. This upcoming change in

search abilities should narrow the choice between merely stripping personal identifiers from data and making all data available to the general public to a determination of whether access by the general public to documents with sensitive information should only be allowed on a showing of a particularized need.

Element 3 - Need for Access to Financial Information in Bankruptcy Cases

Questions:

- (3.0) What access do various parties need to financial information in personal bankruptcy cases? Which individuals or entities require access to which particular types of information, for what purposes, and under what circumstances?
- (3.1) What entities currently access public record data?
- (3.2) What entities currently access non-public data from trustees?
- (3.3) What specific data elements do they need, and for what purposes?
- (3.4) Are the purposes for which the information is sought consistent with the public interest?

A. Public Data.

- (3.5) What data elements in public record data should remain public for purposes of accountability in the bankruptcy system? For other purposes?
- (3.6) Is there certain information that need not be made available to the general public, but could be made available to a limited class of persons?
- (3.7) If so, what are these data elements, to whom should they be made available, and for what purpose?
- (3.8) Is there a need to make the following data elements publicly available: (a) Social Security numbers, (b) bank account numbers, (c) other account numbers?

B. Non-Public Data

- (3.9) What issues, if any, are raised by existing limitations on trustees' handling of personal information?
- (3.10) Are all of the data elements held by bankruptcy trustees necessary for case administration purposes? If not, which data elements are not?
- (3.11) What interests would be served by private or commercial enterprises collecting, compiling electronically, and redistributing information from bankruptcy cases?

Comments - Advantages of Flows of Personal Information:

Credit card companies commented that there are at least three categories of private sector parties who must have the right to access bankruptcy information: (a) creditors and others whose interests are affected by the debtor's bankruptcy case; (b) creditors and other businesses who may consider doing business with the debtor; and (c) the general public and its representatives. They also believe that information provided by debtors to justify obtaining bankruptcy relief, including account numbers and Social Security numbers, must be made available to the public, and that restrictions on this information will harm consumers. They also stated that public record retrieval companies gather and make available information more efficiently than other mechanisms, such as

the bankruptcy courts that lack the necessary resources to respond to requests from parties who are interested in reviewing bankruptcy cases.

Most of the financial associations commented that they support the disclosure of public and non-public information to all parties in interest. Most associations commented that the disclosure of this information permits creditors and other parties in interest to participate effectively, encourages creditors and other interested parties to detect improper or fraudulent use of the bankruptcy process, and assures public oversight and confidence in the bankruptcy system.

One financial association commented that public policy should aim to maximize bankruptcy case data flows to all parties in interest, and that creditors need detailed bankruptcy information and electronic information exchange to: (a) determine whether they are a party in interest; (b) ascertain the accuracy of a borrower's claim; and (c) communicate efficiently with trustees and obtain information about the case status.

Another financial association commented that because the increase in bankruptcy filings has resulted in dramatically increased costs for creditors' to monitor and participate in bankruptcy proceedings, there should be efficient and low-cost access to accurate and complete information regarding who has filed bankruptcy, their financial information, and the trustee's administration of the case. Further, the interests of all parties in bankruptcy would be well served if enterprises could collect, compile, and electronically disseminate information about bankruptcy cases.

A credit bureau association commented that it is important for its industry to know the facts of the bankruptcy case as well as to have access to full identifying information. The association also commented that without identifying information it would be difficult to meet the Fair Credit Reporting Act accuracy standards. These standards are already difficult to meet as approximately 3 million last names change each year due to marriages and divorces.

An information services provider commented that it is important to be mindful of the long-standing American tradition of open access to public record information. Individual reference service companies should have access to full identifying information of debtors. They also commented on the need to ascertain accurate information as, for example, there are currently over 2,700 Robert Smiths in New York; without identifying information it would be difficult to distinguish which Robert Smith is in bankruptcy.

All of the credit union associations commented that public and non-public financial information should be made available to parties in interest. One commenter suggested that if full information on personal bankruptcy were made freely available, he could more effectively administer his bankruptcy program. Another association commented that limiting access to specific groups would prove costly, be difficult to administer, and would curtail the availability of needed information. Most associations believe that greater access to debtor information would ensure more effective checks and balances in the system, and make it more difficult to conceal inaccurate, incomplete, and fraudulent information.

A consumer privacy organization commented that there may be legitimate public interest considerations for providing aggregate reports, stripped of information that may identify specific individuals, on debtors' interactions with the bankruptcy system and creditors.

Comments - Disadvantages of Flows of Personal Information:

A clerk of the U.S. Courts commented that the primary entities who access and use bankruptcy information are not using the information for purposes consistent with the public interest, but rather for commercial purposes. Only limited information, such as case number, location of filing, chapter, information regarding debtor's attorney, the trustee, the judge, all hearings and meetings, case status information, and possibly some descriptions of real property should remain "public". However, unless a debtor has been determined to have engaged in credit fraud, his/her Social Security number, bank account numbers, or other account numbers, should not be made available to the general public.

Most financial associations commented that parties in interest, as well as those entities that may be a party in interest, need access to all available information in both the public and non-public file. However, several associations commented that there should be restrictions on the public accessibility of non-public information. One association commented that it supports efforts to protect the non-public, personal information of consumers financial services, as well public policies that properly balance the legitimate information sharing needs of a financial institution with the obligations to protect consumer privacy.

A privacy rights group commented that while recognizing the long-standing principle that the public interest is served by open court proceedings, it does not believe that the public interest is served by subjecting individuals in bankruptcy to identity thieves and unscrupulous marketing. Although bankruptcy court personnel and trustees require information from debtors to perform their duties, access to sensitive personal information on the Internet would seem to invite abuse. The privacy rights group was also concerned that sharing and selling of information derived from the bankruptcy process on the Internet will allow for more extensive profiling of individuals.

Credit union associations provided varying comments as to whether personal information should be made available to the general public. Several credit union associations supported restrictions on access to personal financial information, and noted that these restrictions should not only limit who can access this information, but how it is accessed and for what purpose. Most of the associations commented that only the trustee should have access to non-public information.

Although one credit union believed that the aggregation and dissemination of debtor information by commercial firms could reduce the cost of bankruptcy and enhance the availability of information, it also could support a general prohibition on the sale or other distribution of this information to those with no legitimate need for it.

Several commenters suggested that some consideration should be given to protect the privacy of those individuals who have to file for bankruptcy protection for medical or other catastrophic reasons.

Element 4 - Privacy Issues

Questions:

- (4.0) What are the privacy issues raised by the collection and use of personal financial and other information in personal bankruptcy proceedings?

A. Public Record Data

- (4.1) Do debtors have privacy interests in information contained in public record data made available through the bankruptcy courts? If so, what are those interests? Do they vary by data element? If so, how?
- (4.2) What are the benefits of a public record system for court records in bankruptcy cases?
- (4.3) What are the costs of collecting and retaining data in bankruptcy cases?
- (4.4) To what extent do individuals who file for bankruptcy understand that all of the information contained in the public bankruptcy file is available to the public?
- (4.5) Should debtors in bankruptcy be required to forego some expectation of privacy that other consumers have under other circumstances?
- (4.6) Are there characteristics about debtors in bankruptcy that raise special concerns about wide public dissemination of their personal financial information?

B. Non-Public Data

- (4.7) What are debtors' expectations about what uses and disclosures of information will be made by bankruptcy trustees?
- (4.8) What, if any, privacy interests lie in non-public bankruptcy data held by bankruptcy trustees?
- (4.9) If non-public data were made widely available to the public or to creditors for other non-bankruptcy purposes, what might be the consequences?
- (4.10) Are privacy interests affected if the distribution of non-public data bankruptcy information is for profit?

Comments - General:

The majority of the discussions focused on balancing debtor rights to privacy and the needs of creditors and the public to have accessibility to public and/or non-public information.

A clerk of the United States Courts commented on the costs of collecting and retaining data, stating that approximately 80 - 90% of the clerk's office annual staff expenses are associated with collecting, indexing, and filing information brought to the court, including expenses related directly to providing public access, costs of keeping records at the Federal Records Centers, and the costs of collecting, retaining and providing access to bankruptcy records. However, because these duties also must be performed regardless to support the judges, they are arguably a sunk cost.

Comments - Advantages of Flows of Personal Information:

A clerk of the U.S. Courts commented on both the advantages and disadvantages of the public record system. The commenter noted that there are 5 basic advantages of a public record system for court records. Public scrutiny of information: 1) forces integrity in the bankruptcy system; 2) helps maintain public confidence; 3) allows accurate and reliable data to be collected; 4) helps lenders to make more informed decisions on extending new credit which contributes to efficiencies in credit markets; and 5) allows creditors, as the new interest holders in the estate, to know everything about the debtor and the estate.

Several financial institutions commented that they strongly advocate continued electronic access to information regarding bankruptcy filings. One institution believed that access to complete financial information is essential to a creditor's ability to participate meaningfully in the bankruptcy case and ensure the protection of valuable legal rights. Some financial associations commented that when an individual elects to use a public judicial process to eradicate or modify their financial obligations, he must expect that the fact of the filing as well as detailed personal financial information will become part of the public record.

Several financial associations commented that, in most circumstances, the information filed by debtors provides creditors with the only basis for concluding whether they are entitled to recovery before their contractual rights are forever terminated and, therefore, it is imperative that they continue to have access to all bankruptcy information, with no restrictions, when they may be a party in interest. They also believe that the lack of accessibility to reliable identifiers (e.g., Social Security numbers, account numbers, addresses) will severely hamper creditors' ability to conduct business, and also harm consumers in that one consumer's information could be erroneously associated with a consumer with a similar name or address. They also commented that the potential adverse effects of third party access to detailed financial information are inherently less in bankruptcy situations because the debtor's credit lines will have been canceled or frozen, while his liquid assets are likely to be insubstantial or nonexistent.

Credit card companies, like the financial associations, commented that once individuals choose to involve the public sector by filing for bankruptcy protection, they should expect the facts of this public judicial process to become part of the public record. They also commented that there should be no interference with the ability of bankruptcy courts, trustees and others to compile and disseminate the debtor's public record data and appropriate non-public data electronically or by other means. In regard to privacy, the credit card companies suggested that any potential adverse effect to individuals is less in the bankruptcy context than when an individual is solvent.

The information service providers commented that personal identifiers are critically important in ensuring that reputable, reliable and accurate information is delivered for sensitive decisions, and is also used to combat identification fraud. They also commented that consumers who enter bankruptcy avail themselves of certain specific government protections, including additional privacy protection, that are not available to the citizenry at large.

Credit union association comments were generally divided regarding the public availability of debtor information. Several associations commented that if debtors are unable or unwilling to meet their financial obligations, they should expect to have their financial information scrutinized by any creditor that may suffer a financial loss. They also suggested that debtors' attorneys should explain this potential loss of privacy when advising their clients as to whether bankruptcy is an appropriate course of action. Several commenters stated that Social Security and account numbers should continue to be made publicly available, with one association commenting that these identifying numbers are essential to all involved in the administration of bankruptcy and that instances of fraud are not increased because of their public availability.

Investigative organizations and private enforcement organizations provided the same letter under separate cover. These commenters oppose restrictions on the public's access to information held in bankruptcy filings. They also believe that those who petition the bankruptcy courts for protection from creditors cannot enjoy the same expectation of privacy in their financial affairs as those who honor their legal and financial responsibilities.

Several private individuals commented that court documents should be public record except when a compelling need is otherwise documented. One individual commented that when a debtor files for bankruptcy, he/she waives any and all rights of privacy. Another individual suggested that too much protection is given to the debtor and that bankruptcy is a public issue and information should therefore be publicly available.

A consumer privacy organization commented that although it believes that specific sensitive information about the debtor should not be disclosed, it realizes that there may be legitimate public interest benefits to providing reports stripped of information that may identify specific individuals, on debtors' interactions with the bankruptcy system.

Comments - Disadvantages of Flows of Personal Information:

The Federal Trade Commission (FTC) commented that the Study Agencies may wish to consider to what extent highly sensitive information, such as a consumer's Social Security number, must be included in the public record data in light of the increased risk of identity theft and other illegal conduct. Common forms of identity theft include taking over an existing credit card account, taking out loans in another person's name, writing fraudulent checks using another person's name and/or account number, and opening a telephone or wireless service account in another person's name. Finance-related fraud constitutes 80% of the identity theft filed with the FTC.

The FTC also commented that because certain information necessarily must be put on the public record during a bankruptcy case, consideration should be given to ensuring that debtors are given notice as soon as possible in the bankruptcy process as to how their information will be used and whether and how it will be disclosed. The FTC also commented that consideration be given to prohibiting the commercial use by trustees of debtors' non-public data for purposes other than that for which the information was collected. Finally, the FTC suggested evaluating the interplay

between consumers' privacy interests and the Bankruptcy Code (e.g., where private customer information is protected by a company's privacy statement).

A clerk of the U.S. Courts commented that the cost associated with lost privacy rights of debtors, creditors and others is hard to quantify. The commenter also suggested that unlimited access to bankruptcy information: (a) harms privacy rights by providing greater access than necessary to achieve the public benefit; (b) limits the fresh start by placing a stigma on debtors, (c) contributes unnecessarily to threats of physical harm to parties; (d) contributes unnecessarily to identity theft, credit fraud and lender redlining; and (e) with new technology, may hinder individuals from seeking redress under the bankruptcy laws.

An academia commenter suggested that because there is little privacy protection directly within the bankruptcy laws, there needs to be a detailed assessment of the privacy protections afforded by non-bankruptcy law and how those protections are, if at all, impaired by wide access to bankruptcy files. Also, the commenter recommended that consideration be given to identifying particular information that requires greater privacy protection.

A state attorney general commented that the state has a duty to protect debtors and to ensure that the debtors should not be required to surrender any privacy rights beyond what is required for the administration of their cases.

A national bankruptcy attorneys association commented that given the broad dissemination of public record data which exists, debtors are entitled to have their information protected from unnecessary disclosure. The association also believes that debtors are generally fearful of and unfamiliar with the bankruptcy process and do not envision that their files may be available for review by any member of the public. Disclosure should be limited to only what is necessary for: (a) creditors to identify the debtor in order to file a claim; 2) trustees to review the debtor's assets, their values, and the debtor's right to the claimed exemption; and 3) trustees to review the debtor's ability to repay his/her debts.

The attorney association also commented that special protections should be afforded to single parents with children, who are particularly likely to be victims of abuse or involved in acrimonious relationships, and to the elderly, who may be more vulnerable to scams and could be targeted through the use of information from bankruptcy files. Investigative files made by the trustee in the administration of cases might disclose the names of people interviewed and thereby, infringe on the privacy interests of people other than the debtor.

A consumer privacy organization commented that in the context of bankruptcy, "general" information about the individual filing for bankruptcy may need to be available to the public to ensure that all those with a stake in the outcome may participate. However, "detailed" information, currently considered public records under 11 U.S.C. §107(a), such as bank account numbers, credit card account numbers, Social Security numbers, and bank balances are not necessary to ensure that parties with an interest are notified. Public disclosure of such information

breaches personal privacy and places individuals at risk of additional financial harm. In sum, the exposure of the individual's personal information should be no greater than necessary to serve the purpose of the bankruptcy process fairly.

As previously noted, credit union association comments were generally divided regarding the public availability of debtor information. One credit union association commented that bankruptcy information should be categorized as to public and non-public, who may have access, such as creditors, and the factors to be used to determine accountability. It also recommended that there should be restrictions and penalties on the use and disclosure of non-public information that is collected by the trustee. One association recommended that this information should only be available to creditors, or others who would qualify as "affected or interested parties" that are involved in the case, but its use should be restricted and not disseminated to the general public by anyone who has access, including the creditors.

Most private individuals commented that an individual's personal and financial information should be limited to those who need to know, and then only with the individual's written permission. One individual commented that Social Security numbers should never be public information and a separate personal identification number should be used instead. Another individual commented that only parties in interest should be able to access personal information but only for the purpose specifically associated with the evaluation of the bankruptcy, and that all personal information should be destroyed after the bankruptcy is finalized.

Element 5 - Effect of Technology

Questions:

- (5.0) What is the effect of technology on access to and privacy of personal information?
- (5.1) Do privacy issues related to public record data in bankruptcy cases change when such data are made available electronically? On the Internet? If so, how?
- (5.2) Do privacy interests in non-public data change when such data are compiled electronically for ease of administration of bankruptcy cases? For commercial use? For other use?
- (5.3) Are new technologies being used to improve access to court records? Non-public bankruptcy data? Should they be? Why or why not?

Comments - Advantages of Flows of Personal Information:

A financial association commented that the most appropriate method for handling the accessibility of information derived from bankruptcy cases would be on a technology neutral basis. Thus, the rules would be the same regardless of the medium used to disclose the information.

Another association commented that the rapid availability of public data through technology assists creditors in their timely assertion of their rights in the bankruptcy process as well as in avoiding adverse actions against the debtor, such as repossessions, garnishments, and collection calls.

A credit union association commented that the ability to obtain information electronically will reduce the credit union's costs associated with traveling to the courthouse and of copying the necessary information.

An information services group commented that public record information is already readily available at government offices, and that the computerization of this information has simply made access less costly and more convenient.

One individual commented that the use of electronic filing of information and access to debtor data by the Internet is an absolute necessity to modernize the entire system. The commenter also suggested that those that abuse the use of the information should be dealt with under other laws.

Comments - Disadvantages of Flows of Personal Information:

The Federal Trade Commission commented that the concern of the availability of Social Security numbers and other sensitive personal information is heightened with the increasing availability on the Internet of courts' public record data. They suggested that if the Study Agencies determine that certain personal information should be kept on the public record, they may wish to consider the feasibility of restricting, in an appropriate manner, the commercial use of such public record data for purposes other than the bankruptcy.

A consumer privacy organization commented that the privacy of debtors is not protected under existing bankruptcy rules - with or without the automation of information. If computerized systems are designed without an eye towards protecting privacy, they can exacerbate existing privacy loopholes and present unique challenges to protecting privacy. To gain the protection afforded by the bankruptcy system, individuals must provide information that is necessary for the bankruptcy system to structure relief for debtors and secure payments for creditors fairly, but it is hard to imagine how such unmediated access serves the interest of society, the debtor, the creditor, or the bankruptcy system.

A privacy rights group commented that with the widespread use of the Internet, almost anyone can anonymously obtain the most personal details of an individual's life without limitation on how the information is used. If bankruptcy and trustee files are available online to the general public, there should be some limitations on the types of information that can be accessed. Access to sensitive information should be limited to trustees and court personnel who are directly engaged in the administration of bankruptcy cases by the use of passwords, or other means. The commenter recommended that for public access, the bankruptcy record should be limited to a "digest" of the key data elements and that the full text document should not be available via the Internet to the general public.

A financial association commented that it is critical for parties in interest to continue to receive timely notice of Social Security numbers. However, because information technology can make such information readily available to the general public and increase the potential for identity theft, the commenter supports limiting public display of these identifying numbers.

A credit union association commented that it is unlikely that public access to debtors personal information at the local bankruptcy court would affect a debtor's choice to file bankruptcy, but making this information available on the Internet would expose debtors, who are already in precarious financial positions, to an enhanced risk of identity theft. This unintended result outweighs any possible benefits and that there is no substantial reason to make this information available to parties who do not have an interest in the bankruptcy case.

Another credit union association recognized that consumer privacy has been compromised to some extent and therefore, it could possibly support some modest restrictions on the access of information that is submitted in the bankruptcy process. However, these restrictions would only be acceptable as long as they in no way impacted a credit union's ability to have unfettered access to the information it needs.

An academia commenter noted that the possibility of electronic access to personal information changes the cost in a dynamic way. Another dimension to this issue is the selling of data for which clear policy positions on data ownership need to be developed, and policies concerning both data access and data dissemination determined.

Element 6 - Current Models for Protecting Privacy & Ensuring Appropriate Access to Information

Questions:

- (6.0) What are current business or governmental models for protecting privacy and ensuring appropriate access in bankruptcy records?
- (6.1) What statutes, rules, or policies can serve as models for maintaining appropriate levels of access and privacy protection for public bankruptcy records? For non-public bankruptcy information held by trustees?
- (6.2) What statutes, rules, or policies are ineffective in providing appropriate access and privacy interests?
- (6.3) What statutes, rules, or policies, are otherwise relevant to this Study?

Comments - General:

A credit union association and a credit bureau organization both commented that the Fair Credit Reporting Act governs consumer information companies that provide credit and mortgage reports, fraud prevention and risk management products, tenant and employment screening services, check fraud and verification services, and collection services. It was also suggested that, similar to the Fair Credit Reporting Act, the Bankruptcy Code should include permissible and restricted uses of consumer information.

Comments - Advantages of Flows of Personal Information:

Comments from financial associations focused on the government model mandated in 11 U.S.C. §107(a) of the Bankruptcy Code which requires that "a paper filed in a case under the Bankruptcy Code and the dockets of the bankruptcy court are public records and open to examination by an entity at reasonable times without charge". The commenters noted that pursuant to §107 the only

instances when the court may decline to make information publicly available are: (a) if the information is a trade secret or confidential research, development, or commercial information, or (b) to protect a person with respect to scandalous or defamatory matter. Thus, the law requires all information filed in connection with a bankruptcy proceeding, such as a debtor's name, address, and account numbers, to be made publicly available.

A credit card company commented that Congress, which recognized the importance of making bankruptcy information publicly available when it enacted the Bankruptcy Code of 1978, has consistently supported the need for creditors to have access to data related to bankruptcy as part of fair and accurate risk assessment. The companies also believe that the need of the public to know of the filing of the bankruptcy cases outweighs the debtors' desire to avoid the embarrassment and difficulties attendant to the filing of the bankruptcy.

A financial services association noted that the Constitution significantly limits any attempt to make bankruptcy information inaccessible to creditors, other interested parties or the public, and that it does not require creditors and others to comply with restrictions, such as the automatic stay and post-discharge injunction, without giving them adequate information from the court. Thus, they believe that no new regulation restricting access appears to be appropriate in light of the substantial benefits debtors receive from bankruptcy and the needs of the bankruptcy system, those affected by it, and the public for access to the information that the debtor provides.

Comments - Disadvantages of Flows of Personal Information:

A consumer privacy organization commented that the 1973 Code of Fair Information Practices (FIPs) developed by the Department of Health Education and Welfare is a useful starting point for reconsidering the information policy of the bankruptcy system. In general, the Code of FIPs requires that: (a) data be collected for legitimate and articulated purpose; (b) only data necessary to support the purpose be collected; (c) data only be used and disclosed to advance the purpose; (d) the individual be able to access and correct personal information; and (e) the collecting entity secure the information it maintains.

A privacy rights group commented that it prefers the FIPs developed by the Canadian Standards Association (CSA) as they more closely parallel the Organization for Economic Cooperation and Development (OECD) and the European Union Data Protection directive. Specifically, the CSA code contains important principles such as accountability, identifying purposes, consent, limiting collection, limiting use-disclosure-retention, accuracy, security safeguards, openness, individual access, and challenging compliance. The commenter also noted that the Federal Trade

Commission has developed an abridged version of five FIPs: notice, choice, access, security, and enforcement.

Element 7 - Recommendations on Handling Bankruptcy Data

Questions:

- (7.0) What principles should govern the responsible handling of bankruptcy data? What are some recommendations for policy, regulatory or statutory changes?

A. Public Record Data

- (7.1) To what extent are privacy safeguards appropriate for public record data? If safeguards are appropriate, what should they be? How should they be crafted to ensure that they do not interfere with legitimate public needs to access certain bankruptcy data?
- (7.2) Should notice about the public nature of bankruptcy filings be provided to individuals who file for bankruptcy? What form should such notice take?
- (7.3) Should there be any restrictions on the degree of accessibility of such information, such as rules that vary if information is made available electronically? via the Internet? If so, what should they be? Should policies on the handling of information in bankruptcy cases be technology neutral, so that the rules for dealing with information are the same regardless of what medium is used to disclose such information? Why or why not?
- (7.4) Are there any data elements in public record data that should be removed from the public record and held instead as non-public data by bankruptcy trustees or courts?
- (7.5) Is there some experience with other public records that is relevant to the privacy and access issues in bankruptcy cases? Do any records or filing systems, for example in the courts, provide instruction in this regard?

B. Non-Public Data

- (7.6) To what extent are privacy safeguards appropriate for non-public data held by bankruptcy trustees in bankruptcy cases? If some safeguards are appropriate, how should they be structured? How should they be crafted to ensure that they not interfere with the needs of bankruptcy trustees to administer their cases?
- (7.7) Should debtors receive notice of what uses and disclosures will be made of their information in the hands of bankruptcy trustees? What would be the effects of such disclosures?
- (7.8) Should restrictions be imposed on the use and disclosure of information held by bankruptcy trustees? If so, what types of restrictions? What would be the effects of such restrictions?
- (7.9) Should debtors be permitted to access the information held about them by bankruptcy trustees? If so, under what circumstances? What would be the effects of such access?
- (7.10) If bankruptcy data are compiled and made easily and widely available to users outside of the bankruptcy system, should these users be charged for the collection and distribution process? How would the amount of the charge be set?

Comments - Advantages of Flows of Personal Information:

A financial association commented that the utilization of technologies that enhance the dissemination of public information should be viewed as a positive development. The commenter opposes any attempts to eliminate or restrict the currently available public information, as well as any attempt to restrict the electronic access to this public information. Any such attempt would likely impose substantial and unnecessary burdens on the court and trustee system. The commenter also supports allowing bankruptcy data to be aggregated and distributed by third parties for a reasonable fee.

Comments - Disadvantages of Flows of Personal Information:

A national bankruptcy attorney association commented that bankruptcy data should be protected in the several ways. First, sensitive data about the debtor and non-filing parties which are necessary for the creditors and the trustee should be compiled on separate documents which are available to them, but not available to the public. Second, serious penalties should be imposed on creditors that use any information received in connection with the bankruptcy filing for any purpose other than to collect a non-dischargeable debt directly from the debtor. Third, trustees should be held liable for disseminating or allowing dissemination of sensitive information to anyone other than the debtor or the debtor's attorney. Fourth, trustees should be prohibited from releasing case administration and disbursement data to anyone except the debtor, the debtor's attorney, and a listed creditor in the case. Finally, the association recommended that any entity which owns the hardware upon which any information described as protected is stored, or who operates an Internet-site containing such information, should be held liable and subject to serious penalties if it accesses or used such stored data in any way.

Several individual attorneys commented on the issue of protecting the identity of debtors. One attorney commented that there is a particular and pressing need to protecting the privacy of victims of domestic abuse, and that for these victims, the bankruptcy system should provide protection and confidentiality, particularly regarding the whereabouts of the victim. Another attorney commented that it is important to make general debtor data available without identifying the debtors, possibly by assigning confidential numbers to files. The attorney also recommended that access to the actual case file information should be restricted to the trustees, attorneys of record and people who show adequate cause. Another attorney commented that it is a convenience to have bankruptcy information available on the Internet, and if there are concerns about privacy, some of the information could be password-protected and its access could be tracked to identify misuse of the information.

A consumer privacy organization commented that information policy should not be taken to suggest that, unless there is a compelling privacy interest, personal information collected through the bankruptcy process should be publicly accessible. An information policy should be in favor of protecting the rights of the individual citizens who interact with the bankruptcy system by limiting the use and disclosure of personal information to those necessary to support the bankruptcy process.

A credit union association is concerned about organizations in bankruptcy being able to sell consumer information regarding former customers, and recommends that appropriate actions be taken to ensure that consumers' rights are adequately protected.